SUPREME COURT, U.S.
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No. 539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

AMERICAN PRESIDENT LINES, LTD.,
Petitioner,

—against—

HONORABLE RICHARD H. LEVET,
UNITED STATES DISTRICT JUDGE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM GARTH SYMMERS,
Counsel for Petitioner,
37 Wall Street,
New York 5, N. Y.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, American President Lines, Ltd., prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 24, 1961, denying its petition for a writ in the nature of a writ of mandamus. The petition sought an order directing respondent, the Honorable Richard H. Levet, United States District Judge for the Southern District of New York, to reinstate a jury verdict for petitioner, American President Lines, Ltd., which respondent had set aside as against the weight of the evidence.

OPINIONS BELOW

The unreported opinion of the District Court setting aside the verdict and granting a new trial is in the Appendix printed for use in the court below at pages 6a-13a. The

opinions of the Court of Appeals dated March 14, 1961, and May 26, 1961, unreported as yet, are set forth herein in Appendices A and B, *infra*.

JURISDICTION

The order of the Court of Appeals was entered on March 24, 1961 (R. 9). Petition for rehearing, including in banc consideration, was denied on May 26, 1961 (R. 18-22). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether a United States District Judge has absolute, unlimited, unreviewable discretion to order a new trial in a civil jury action because the verdict seems to him contrary to the weight of the evidence, where issues of fact, of negligence, and of credibility of witnesses were passed upon by the jury, where there was no error in the course or conduct of the trial, and where it affirmatively appears that there was no preponderance of evidence against the prevailing party.

CONSTITUTIONAL PROVISION, STATUTORY PROVISIONS, AND RULE INVOLVED

United States Constitution, Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Jones Act, Title 46, United States Code, Section 688:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

Title 28, United States Code, Section 1651(a):

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 59(a) of the Federal Rules of Civil Procedure:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * *.

STATEMENT

The District Court action was brought by James Weaver to recover against petitioner American President Lines, Ltd., for personal injuries allegedly sustained at sea on June 17, 1956, while plaintiff was employed as pantryman aboard the petitioner's steamship PRESIDENT JACKSON. Plaintiff sued under the Jones Act, 46 U. S. C. 688, and under the general maritime law doctrine of unseaworthiness,[1] claiming that as he was stepping out of the vessel's vegetable refrigerator box into the thaw room he was struck by the door of the adjacent dairy refrigerator box, which is said to have been opened suddenly by the chief cook.[2] Plaintiff's claim was based upon the alleged negligence of the chief cook, and upon the alleged unseaworthiness of the ship as to the position of the doors.

The trial was before the court and a jury on October 11, 13, 14, and 17, 1960 (R. 3a). The evidence of the alleged accident consisted of the plaintiff's testimony and portions of the deposition of the chief cook testifying for plaintiff. Defendant called no witnesses because there were none. Plaintiff on direct examination gave contradictory versions (R. 87a, 88a) describing in detail how the door hit him. On cross-examination he admitted that he had no recollection of any such details and that his only recollection was that of lying on the deck (R. 149a-150a). Plaintiff's

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[1]Plaintiff also claimed additional maintenance and cure above $3,608.00 which petitioner had already paid plaintiff for maintenance and cure. This claim has been settled for $4,297.15.

[2]In the steward's stores area of the ship there were a number of refrigerated boxes opening into a thaw room. The vegetable box was at one end of the thaw room. The door of this box opened from left to right, viewing it from the thaw room. The dairy box was on the adjacent wall to the left. The door of the dairy box opened from right to left. The installation was standard on the class of ships similar to the PRESIDENT JACKSON (R. 209a).

testimony that he was struck by the dairy box door just as he was stepping out of the vegetable box door was a physical impossibility in view of the clearance between these two doors, as shown by plaintiff's scale model (Ex. 14; R. 8a).

Plaintiff at first testified that he had suffered no back trouble (his major complaint at the trial) prior to this alleged accident (R. 80a). Later he admitted that he had earlier sustained a back injury in a serious automobile accident (R. 128a-129a). The chief cook on direct examination stated that he saw the dairy box door hit the plaintiff (R. 202a, 217a) and saw plaintiff fall (R. 206a). On cross-examination he testified that he saw neither of these things and that the only thing he saw was the plaintiff lying on the deck (R. 207a-208a, 217a-218a).

The jury was presented with the simple issues of the credibility of plaintiff and the cook and of whether the cook was negligent when he opened the dairy box door. On the latter point, the cook testified that he opened the door with his foot and that this was the normal method of opening the refrigerator doors (R. 215a).

After deliberating for three hours, the jury returned a special verdict for defendant finding that neither defendant nor any of its employees was guilty of negligence as to the operation of the dairy box door and also finding that the PRESIDENT JACKSON was not unseaworthy in any respect in regard to the location or construction or other features of the doors in the thaw room (R. 251a).

Plaintiff moved for judgment notwithstanding the verdict, which was denied. Plaintiff also moved to set aside the verdict and for a new trial. This application was based solely on the ground that the verdict was contrary to the weight of the evidence. No trial error was claimed (R. 46a, 47a).

During the hearing on the motion for a new trial, the judge stated:

> I do not see how I can substitute . . . my views, if I had any, for those of the jury. They passed on this question, which seems to me factual. They have passed on it adequately. They deliberated from lunch time until three, and then they called for the testimony of Mr. Gruetzbach, the chief cook; and they listened for an hour to his testimony; they went back and deliberated for an hour, and I feel I must deny the motion. (R. 48a)

However, the trial judge agreed to reconsider and subsequently set aside the verdict and ordered a new trial "because (1) the verdict seems contrary to the clear weight of the evidence; and (2) such a recourse is necessary to prevent what may be a miscarriage of justice." (R. 13a). The trial court made its own findings of the crucial facts by adopting as "for the most part uncontroverted" the plaintiff's theory of the alleged accident (R. 11a). The court then held that it "would seem" unreasonable for the jury to deduce from this "uncontradicted evidence" that the cook was not negligent in opening the dairy box door. On this basis the court set the verdict aside.

Defendant petitioned the United States Court of Appeals for the Second Circuit for a writ in the nature of a writ of mandamus directing that the verdict be reinstated on the ground that the trial court had abused its discretion in that it had applied an incorrect legal standard in ruling on the motion for a new trial and that its ruling was beyond the range of discretion when viewed in light of the correct standard (R. 3-6).

On March 24, 1961, the Court of Appeals denied the petition (R. 8-9; Appendix A, *infra*). Petitioner filed a timely petition for rehearing including in banc consideration (R. 10-17) which was denied (R. 18-19; Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

A serious constitutional question as to the legal standard to be applied by judges in the United States District Courts presiding at jury trials in ruling on motions to set aside verdicts "as against the weight of the evidence" is involved. There is confusion and conflict in the lower federal courts about the proper standard to guide the actions of the trial judge and appellate review of his actions.

The court below has infringed the petitioner's right to trial by jury by declining to correct the action of a trial court setting aside a jury verdict "as against the weight of the evidence," and has deprived the petitioner of its constitutional right to a jury verdict where the jury's conduct and verdict were indisputably reasonable.

The court below declared that it is salutary for the trial judge to be allowed to set aside a jury verdict, whether for the plaintiff or for the defendant, if he believes the verdict is against the weight of the evidence and produces an unjust result, and that the trial judge's order is not reviewable whether the action taken was erroneous as not being the wisest possible exercise of discretion or whether the verdict was in fact against the weight of the evidence.

While the challenged rule in this case set aside a jury verdict for defendant, there is no way in which the case can be distinguished from one setting aside a plaintiff's verdict; indeed, given the location of burden of proof, the setting aside of a defendant's verdict should be subject to even greater scrutiny. Hence the right to jury trial by both parties to every action is at stake.

This rule, which the court below stated as the one that prevails generally, is in direct conflict with the opinion of the United States Court of Appeals for the Third Circuit in *Lind v. Schenley Industries, Inc.* 278 F. 2d 79 (3d

Cir. 1960), *cert. denied*, 364 U. S. 335 (1960), and the decision of the Sixth Circuit in *Werthan Bag Corp. v. Agnew*, 202 F. 2d 119 (6th Cir. 1953), among others. In *Lind* the court recognized:

> . . . [T]here is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. (p. 90)

After reviewing the conflicting cases the court stated:

> . . . [W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. (p. 90)

Sir Patrick Devlin, in TRIAL BY JURY (1956), said:

> . . . The native intelligence of the jury operates, as it were, upon the middle of the evidence, albeit a very large middle; it must not act entirely without evidence and it must not go entirely against the evidence. The check at each end must be justified by substantially the same considerations. To say that a verdict will be set aside if it is "contrary to the weight of the evidence"—that is the rather misleading phrase often used—does not mean that the weights are to be more or less evenly balanced or that the scales are to be set by the judge; that would make the assessment by the jury altogether super-

> fluous. It means that the weight of the evidence contrary to the verdict is enough to crush it; the test is whether twelve reasonable men, if they had appreciated the evidence rightly and applied the law as laid down to them, could have returned the verdict. In the ordinary case, perversity or something rather like it must be shown. (p. 65)

Professor Thayer, in A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898), most aptly wrote:

> . . . [W]hen the original question for the jury is one of reasonable conduct, and a court is called on to revise the verdict, the judges do not undertake to set aside the verdict because their own opinion differs from the jury's. They are not an appellate jury. (p. 208)

Lord Halsbury, in *Metropolitan Railway Co. v. Wright*, 11 App. Cas. 152 (H. L. 1886), said:

> . . . If reasonable men *might* find . . . the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. (p. 156)

Mr. Justice Story, on circuit, in *Ilsop v. Commercial Insurance Co.*, 1 Fed. Cas. 564 (No. 262) (C. C. D. Mass. 1833), said:

> . . . I hold it to be my duty to abstain from interposing with the verdict of a jury, unless the verdict is clearly against the undoubted general current of the evidence, so that the court can clearly see, that they have acted under some mistake or from some improper motive, or bias, or feeling. (p. 571)

This case squarely poses the conflict between the decision of the court below, that the trial judge may vitiate the jury's

verdict, and the decisions of other circuits, that the trial judge may not act as a "thirteenth juror" nor as an "appellate jury" to set aside a verdict simply because he disagrees with the jury's finding or considers it "against the weight of the evidence." The conduct of the trial judge is the standard set by the court below in considering the reviewability of an order negating a jury verdict; by contrast, in the majority of cases, supported by the considered views of eminent authorities, the conduct of the *jury*, rather than that of the judge, is the factor for consideration in determination of the finality or reviewability of a jury's verdict.

ARGUMENT

I

TO PROTECT LITIGANTS' RIGHTS TO A JURY TRIAL THE VERDICT OF THE JURY SHOULD HAVE BEEN REINSTATED BY THE COURT BELOW TO PREVENT THE DENIGRATION OF THE JURY SYSTEM AND THE USURPING OF THE FUNCTION OF THE JURY AS TRIER OF THE FACTS BY THE TRIAL JUDGE.

The respondent in this case set aside the verdict of a jury in petitioner's favor because it "seems contrary to the clear weight of the evidence" (R. 13a) and granted a new trial, although it affirmatively appears that no reasonable basis existed for this action. The court below held, in effect, that this action was unreviewable. The result is a serious inroad on the right to jury trial under the Seventh Amendment, at common law, and under applicable statutes.

Lind v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir. 1960), *cert. denied*, 364 U. S. 335 (1960), expresses with great clarity the reasons supporting appellate control of trial court discretion in setting aside the determination

of juries on the ground that they are against the weight of the evidence:

> . . . New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons; for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. . . . In the latter instances, (2), supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.
>
> [17] But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment on the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial. (p. 90)

In contrast, the opinion of the court below has placed the trial judge in the position of a thirteenth or appellate juror.

Two simple, connected issues were before the jury:

1. What were the facts with respect to Weaver's alleged sustaining of an injury by the opening of the door?

2. Assuming he was injured by the opening of the door, was there negligence chargeable to petitioner?[3]

These are typical, run-of-the-mill jury questions. The jury's verdict, after a trial without claimed error, and after adequate deliberation, was in petitioner's favor. There is absolutely nothing in the evidence to make it improper for the jury to find that plaintiff had failed to sustain his burden on the crucial issue of negligence. Indeed, it is questionable whether a verdict for the plaintiff could have been properly sustained.

There were only two witnesses: the plaintiff Weaver, and Gruetzbach, the chief cook on the ship. The plaintiff testified to no more than that he had been struck by the door. Gruetzbach, who opened the door, testified that he did so in the normal manner (R. 215a).

Contradictions impaired the credibility of each of these witnesses; the assessment of those contradictions was solely within the province of the jury (*supra*, p. 4).

The record shows that a red warning light burned outside the door (R. 89a-90a, 200a) that allegedly struck plaintiff, and that the door locking mechanism made a loud warning noise in opening (R. 171a). This not only suggests contributory negligence, but also has relevance in determining the standard of care owed by Gruetzbach in

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[3]The opinion and order for a new trial indicate no dissatisfaction by the respondent with the jury's determination that the "unseaworthiness" count was without merit. The record shows that the equipment involved was standard and nothing in the record tends to show any unsafe characteristics or disrepair. Since the new trial order was not based on the unseaworthiness count, discussion of it is omitted from this petition.

opening the door. It was the jury's function to consider this uncontroverted evidence in deciding the issue of negligence.

If all the testimony of Weaver and Gruetzbach were to be believed, and were construed most favorably to plaintiff, it could at best be inferred that Gruetzbach opened the door quickly and that it came in contact with the plaintiff. No circumstances were shown to establish any preponderam evidence of negligence.

II

THE TRIAL COURT IN COLLOQUY DURING THE ARGUMENT OF THE APPLICATION FOR A NEW TRIAL RECOGNIZED THAT THE VERDICT OF THE JURY WAS REASONABLE UPON THE EVIDENCE.

In colloquy with counsel the respondent very clearly indicated that the evidence on negligence, far from preponderating heavily in plaintiff's favor, was insufficient. When the motion for a new trial was made, immediately after announcement of the jury verdict, the following colloquy took place:

> The Court: Are there any motions, Mr. Tabak?
>
> Mr. Tabak: If your Honor please, could I be excused from making any motions now and make them within a few days, sir?
>
> The Court: What is there? It is all a [554] question of fact, isn't it?
>
> Mr. Tabak: Well, I first move to have the verdict set aside as being contrary to the weight of the evidence.
>
> The Court: Motion denied. (R. 39a)

On further hearing of the motion for a new trial, the following took place:

> The Court: I do not see how I can substitute, Mr. Tabak, my views, if I had any, for those of the jury. They passed on this question, which seems to me factual. They have passed on it adequately. They deliberated from lunch time until three, and then they called for the testimony of Mr. Gruetzbach, the chief cook; and they listened for an hour to his [568] testimony; they went back and deliberated for an hour, and I feel I must deny the motion.
>
> . . .
>
> Mr. Tabak. . . .
>
> I say if that is done there cannot be any doubt that this jury or these jurors might, I say, [569] have come to their decision under bias or prejudice or some other reason. It is my humble opinion that they most certainly did not follow the Court's instructions or they did not understand the Court's instructions and came to their decision erroneously. I feel a gross miscarriage of justice has been done by this jury.
>
> The Court: I do not know anything on which you base that. There is nothing in the record. There is nothing in the deliberations that we know of by the jury——
>
> . . .
>
> The Court: Isn't it true that the doors had to open——
>
> Mr. Tabak: Excuse me, sir?
>
> The Court: Isn't it true that the doors had to open——
>
> Mr. Tabak: Yes.
>
> The Court (Continuing):—and had to open in a given place?

Mr. Tabak: Yes, sir.

The Court: And there has been no testimony that I recall to the effect that there were any other devices which were customarily and commonly used in the field to make them any different.

Mr. Tabak: That is true.

The Court: There is not any such testimony.

Now, whether a door was opened by a man's hand or foot it seems to me should not make any great difference. In any event, the doors were there and they were supposed to be opened. So what negligence [571] is there in the last analysis? Opening the doors with a man's foot—is that negligence?

Mr. Tabak: It is negligence, sir, if he did it as he said he did "I kicked the door hard and it flew open." As to the extent——

The Court: I don't know what that means and nobody can express the dimension of the speed by the words "flew open."

How does it indicate anything except that it opened? It may have opened rapidly, but is that negligence in itself? And apparently the jury must have considered that and concluded that whatever the facts were with respect to the opening of the door did not constitute negligence.

Mr. Tabak: Not only did it fly open——

The Court: How can I say if it is negligence?

Mr. Tabak: Excuse me?

The Court: How can I say that the opening of the door under the facts asserted was negligence?

Mr. Tabak: If your Honor please, not merely the opening of the door, but I think there can be an interpretation of the words "flew open," because I do not

think that is how we would speak ourselves if it had no meaning. We would say that [572] we opened the door; it opened slowly; it opened quickly; it flew open. It has a meaning.

The Court: Well, there is not any elucidation of that meaning.

Mr. Tabak: There certainly was not, your Honor, except that I think he testifies as to the manner in which he kicked it. He kicked it hard; he kicked it good.

The Court: He said he had to kick it hard to open it, as I recall it.

Mr. Tabak: That is right, he had to kick it hard; he said he had to kick it good; and I say if that is the fact, that he had to kick it hard or he had to kick it good, then that makes the ship unseaworthy.

The Court: Oh, I don't think so. It was a heavy door and it was quite a complicated mechanism.

You see, there was no testimony to the effect that there was anything wrong with the mechanism. There was no testimony as to anything being lacking; there was no testimony as to there being anything which was in a wrong position, and it is solely related to the opening of the door, and I think you will have to concede that, and the jury has passed on that, and I [573] am most reluctant to interpose my view if it were different, and I do not say that it is different, upon that of the jury. So I am afraid I can do none other than I have already done. (R. 48a-51a)

These passages have been quoted *in extenso* because they establish beyond doubt that this record contained no material on which a new trial order could tenably be based, even as it was evaluated by the trial judge while it was fresh in his mind.

III

THE OPINION OF THE TRIAL COURT SETTING ASIDE THE VERDICT RECOGNIZED THE REASONABLENESS OF THE JURY'S CONDUCT.

Although the respondent ordered a new trial, his opinion confirms that there was no preponderance of the evidence in plaintiff's favor. The posture of the negligence issue is thus stated:

> Plaintiff concedes that the defendant's alleged negligence cannot be predicated solely because the chief cook used his foot to open the door, but plaintiff claims that the manner in which the door was opened constituted negligence. It is true that in his deposition the chief cook in substance stated that the door "flew open." *What this means was never elicited, and there was no indication that this was any unusual process, either by the use of the foot, or as to the speed in which the door was opened.* Moreover, the position of the plaintiff at the time of the accident, about which there was certain testimony, may have been very vital in the minds of the jury. In any case, the jury determined that there was neither unseaworthiness nor negligence on the defendant's part. [Emphasis supplied.] (R. 8a)

Here the respondent referred to the only testimony as to the operative facts claimed to constitute negligence. The finding of a "clear preponderance" in plaintiff's favor, as a basis for setting aside the jury's verdict, is flatly inconsistent with the emphasized statement and with the entire quoted passage.

The respondent set aside the findings of the jury on what must be characterized as untenable grounds:

> On the one hand, we have plaintiff's story that he was struck and injured by the abrupt opening of the

> dairy box door. On the other, we have the uncontroverted testimony of defendant's chief cook that he kicked the dairy box door so that it flew open, despite his knowledge that other persons on board ship had daily access to, and did use, the thaw room. Was it reasonable for the jury to deduce the inferences that it apparently did from the uncontradicted evidence, namely, that the defendant's chief was not negligent in opening the dairy box door, that the door's contact with plaintiff was a mere fortuitous occurrence, an unavoidable incident, or, at most, that plaintiff's own negligence was the sole cause of his accident? The answer would seem to be in the negative. (R. 12a-13a)

In this passage the respondent exhibits that his decision is based on a clear error of law. He suggests that "negligence" and "unavoidable accident" exhaust the alternatives. Actually, an accident that is "unavoidable" from the paristic philosophic point of view may nevertheless not be caused by negligence, for the care necessary to avoid it may be higher than "reasonable care under the circumstances." This is the very area for the exercise of the jury's legitimate function.

The opinion also recognizes, by clear implication, that the plaintiff, far from having a preponderance of the evidence, has not made his case:

> . . . Moreover, upon retrial, plaintiff's counsel might perhaps further elicit from defendant the speed with which the chef Gruetzbach kicked open the dairy box door, and whether the chef lost control of the door as a result, thus placing persons in the immediate vicinity thereof in danger.[3] (R. 13a)

[3]The trial court's suggestion that additional evidence about the opening of the door might be adduced upon a new trial is not, of course, the court's ground for granting the new trial. In any event, this would be a manifestly erroneous ground for granting a new trial. A new trial is granted to admit new evidence only where such evidence was excusably unknown to the first trial.

This is to say that on retrial the plaintiff may make a case of negligence which he has not made on the first trial—a deficiency which, as just seen, the trial judge clearly recognized. His statement, though in form a reason for a new trial, is actually a conclusive reason for sustaining the verdict. Nothing is adverted to, here or elsewhere, that supports the order; nothing could have been, as scrutiny of the record confirms.[5]

Here no trial error was committed, the jury properly considered the evidence and arrived at a reasonable verdict, and no new evidence is claimed or exists. A second trial would be mere re-litigation with no prospect whatever that a more true or just result would be reached. Cf. 6 Moore's Federal Practice, ¶ 59.15[2], p. 3901 (2d ed. 1953).

If the second jury were to disagree with the first, there is no reason to believe that its conclusion would be the "correct" one in a case where different conclusions can be drawn with equal reasonableness from the evidence. If the second jury were to agree with the first, on the very same evidence, consistency would call for the trial judge again to disagree and again to set the verdict aside and order a new trial. The court below suggests that this is unlikely because "presum-

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[5]A factor which may have influenced the trial court to set aside the jury's verdict is the suggested possible prejudicial effect of certain evidence of the plaintiff's criminal record and homosexuality (R. 12a). But the salient and dispositive fact about this material is that it was introduced initially by the plaintiff, in the hospital records. Once it was in the case, defendant's counsel used it, with entire propriety, to show that plaintiff, who is claiming in part on an alleged psychiatric injury, was a psychologically aberrant person as well as a habitual petty criminal, long before the door hit him. No inflammatory or otherwise improper tactics were used to build up this material. In these circumstances, the order of a new trial for plaintiff's benefit, on the basis of the conjectured effect of this material adduced by the plaintiff himself, is clearly erroneous. Parenthetically, the court, in colloquy with counsel at the trial, recognized that this material is relevant to the psychiatric claim, and lucidly justified its use on this ground (R. 151a-152a).

ably" there would be "a different judge presiding," or even if the same judge presided "it is hardly likely that he would again set aside a verdict supported by substantial evidence." The court below, we respectfully submit, has conceded that the jury's verdict was supported by substantial evidence.

IV

THERE IS CONFLICT AND CONFUSION IN THE LOWER FEDERAL COURTS AS TO THE STANDARDS TO BE APPLIED BY A TRIAL JUDGE IN GRANTING A NEW TRIAL AND AS TO THE CRITERIA TO BE EMPLOYED BY APPELLATE TRIBUNALS FOR REVIEW OF THE TRIAL JUDGE'S DECISION.

There is confusion in the lower federal courts regarding the issues presented here. The court stated in *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir. 1960), *cert. denied*, 364 U. S. 335 (1960):

> What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. (p. 90)

Under the standard announced and applied by the court below, a trial judge is permitted to weigh the evidence in the same way that a juror would and to set aside the verdict merely because he feels that the weight of the evidence is the other way. This erroneous standard is occasionally applied in the federal courts. *McBride* v. *Neal*, 214 Fed. 966 (7th Cir. 1914) *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d 350 (4th Cir. 1941); *General Accident Fire & Life Assurance Corp.* v. *Dickinson*, 61 F. Supp. 153 (N. D. Cal. 1945). The opinion in *Murphy* v. *United States*

District Court for the Northern District of California, 145 F. 2d 1018, 1020 (9th Cir. 1944), appears to give the trial judge almost unlimited discretion, holding that "The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just."

There are other standards applied in the federal courts, all of which are contrary to the loose "thirteenth juror" standard adopted in the present case and in the cases cited above. Some courts hold that a verdict may be set aside as against the evidence only where it is manifestly and palpably against the evidence and only in extreme cases. *Weed* v. *Lyons Petroleum Co.*, 294 Fed. 725 (D. Del. 1923); *Lyophile-Cryochem Corp.* v. *Cutter Laboratories,* 78 F. Supp. 903 (N. D. Cal. 1948).

The majority hold that the setting aside of a verdict as contrary to the evidence is permissible only to correct a failure by the jury to perform its duty or to correct some obvious misconception or mistake. *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir. 1960), *cert. denied*, 364 U. S. 335 (1960); *Werthan Bag Corp.* v. *Agnew*, 202 F. 2d 119 (6th Cir. 1953); *Healihan* v. *Turner Construction Co.*, 139 F. Supp. 88 (D. R. I. 1956); *Miller* v. *Pacific Mutual Life Ins. Co.*, 17 F. R. D. 121 (W. D. Mich. 1954); *Pate* v. *Howe*, 103 F. Supp. 421 (D. Me. 1952); *American Cooler Co.* v. *Fay & Scott*, 20 F. Supp. 782 (D. Me. 1937); *Tarter* v. *United States*, 17 F. Supp. 691, 692-693 (D. Ky. 1937); *Plummer* v. *Granite Mountain Mining Co.*, 55 Fed. 755 (C. C. D. Mont. 1893); *Nonce* v. *Richmond & D. R. Co.*, 33 Fed. 429 (C. C. W. D. N. C. 1887); *McHoney* v. *Marine Navigation Co.*, 137 F. Supp. 263 (E. D. S. C. 1955).

This rule protects the finality of verdicts where, although the trial judge might disagree as to the "weight of the evidence," the verdict is one which could reasonably be reached. This view has the venerable authority of Mr. Justice Story,

sitting on circuit in *Alsop* v. *Commercial Insurance Co.*, 1 Fed. Cas. 564 (No. 262) (C. C. D. Mass. 1833):

> . . . There was a time, when courts were disposed to go an extravagant length on this subject, and to set aside the verdict of the jury, merely because, in the opinion of the court, the weight of evidence was on the other side. This was, indeed, substituting the court for the jury in trying the credibility of testimony, and the weight of evidence. For one, I am not disposed to proceed far upon this dangerous ground; and in matters of fact, I hold it to be my duty to abstain from interposing with the verdict of a jury, unless the verdict is clearly against the undoubted general current of the evidence, so that the court can clearly see, that they have acted under some mistake or from some improper motive, or bias, or feeling. (p. 571)

It is important for the guidance of federal trial courts and litigants that the Court resolve the existing conflicts and declare the standards to be applied uniformly in granting new trials, especially as a valuable part of the right to jury trial is at stake.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM GARTH SYMMERS,
Counsel for Petitioner,
37 Wall Street,
New York 5, N. Y.

New York, New York,
August 18, 1961

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN PRESIDENT LINES, LTD.,
Petitioner,

—*v*—

HONORABLE RICHARD H. LEVET,
United States District Judge,
Respondent.

ORDER
ON PETITION FOR MANDAMUS

The Petition, argued on February 20, 1961 pursuant to notice dated February 7, 1961, is denied, since no abuse of the undoubted power of the trial judge in his discretion to set aside the verdict as being against the weight of the evidence and to order a new trial has been shown. See *Marsh* v. *Illinois Central R. R.*, 5 Cir., 175 F. 2d 498, 500; *Garrison* v. *United States*, 4 Cir., 62 F. 2d 41, 42; *Felton* v. *Spiro*, 6 Cir., 78 Fed. 576, 581; 6 Moore's Federal Practice 3819.

CARROLL C. HINCKS
LEONARD P. MOORE
U.S.C.JJ.

STEPHEN W. BRENNAN
U.S.D.J.

March 24, 1961.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Petition for rehearing filed April 7, 1961 — Decided May 26, 1961)

AMERICAN PRESIDENT LINES, LTD., *Petitioner,* —*v*— HONORABLE RICHARD H. LEVET, United States District Judge, *Respondent.*	DOCKET NO. 26787

Before: HINCKS and MOORE, Circuit Judges, and BRENNAN, District Judge.

On Petition for a Rehearing

PER CURIAM:

Petition denied. A verdict, whether for the plaintiff or for the defendant, may be set aside by the trial judge if convinced that it is against the weight of evidence and produces an unjust result. Such action, if accompanied by an order for a new trial, does not deprive the parties of right of trial by jury. This simple, salutary rule prevails generally in the federal courts.

The petitioner argues that such power in the trial judge to set aside verdicts and order new trials, if recognized, may be exercised successively in the same case and thus

finally preclude a judgment on a jury's verdict. But the subsequent trial will be before another jury and presumably with a different judge presiding. And even if a second jury reached the same verdict before the same judge, it is hardly likely that he would again set aside a verdict supported by substantial evidence. Were that to occur, there might be some basis for the appellate court to find the action capricious and hence an abuse of discretion.

The petitioner makes much of the fact that the trial judge at first declined to set aside the verdict; that it was only later after reflection and study that he acted. But, of course, a trial judge as well as an appellate judge has power to change his mind until final action is taken. We find here no indication whatever of any abuse of discretion. Cf *Metzger* v. *Spector Motor Service, Inc.*, 2 Cir., 119 F. 2d 690. Absent any abuse of discretion, whether the action taken was erroneous as not being the wisest possible exercise of discretion or whether the verdict was in fact against the weight of the evidence, are not reviewable questions *Portman* v. *American Home Products Corp.*, 2 Cir., 201 F. 2d 847; 6 Moore's Federal Practice 3820.